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Meeting the Demands of Workers into the Twenty-First Century: The Future of Labor and Employment Law†

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INTRODUCTION

During roughly the period 1750-1900, technological advances in production, transportation, and finance gave rise to the modern industrial corporation and a class of wage earners with interests and demands that were fundamentally divergent from those of their employers.[1] Prior to this period, production was undertaken in small shops with one master supervising a few journeymen who would eventually become masters of their own shops. Although the interests of journeymen and masters may have diverged at a given point in time, there was no fundamental difference in their interests over the course of their lives since journeymen could reasonably expect that any advantages enjoyed by masters under this system of production would eventually also be bestowed on them. However, with the development of improved methods of production, transportation, and capitalization, the optimal size of the shop grew so that one master could supervise many workers, very few of whom could realistically expect to one day run their own shop.[2] Thus, with the development of the modern industrial corporation, there also developed a wage labor class with interests and demands that were completely divorced from the interests of their employers.

Since the birth of this wage class, American society has struggled with the problem of how to meet their demands and has employed several methods toward this end. The first means that was employed to address the demands

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1. ARCHIBALD COX ET AL., LABOR LAW: CASES AND MATERIALS 9-10 (11th ed. 1991); HAROLD W. DAVEY ET AL., CONTEMPORARY COLLECTIVE BARGAINING 16 (4th ed. 1982).

2. COX ET AL., *supra* note 1, at 9-10; DAVEY ET AL., *supra* note 1, at 16.

of wage workers was individual bargaining. The problem was first left to the courts, who applied concepts of master-servant, tort, and contract that were developed during the pre-industrial age.[3] The application of these doctrines, with their philosophical moorings in individual rights, existing property relationships, and freedom of contract, effectively confined the resolution of the problems of the wage class to individual bargaining. Under these common-law doctrines, the efforts of workers to address collectively their concerns through organization and strikes were sometimes held to be criminal conspiracies.[4] Because the legislatures had not yet entered the fray, workers were left to only their own individual resources in seeking accommodation with their employer.

In time, however, this method of addressing workers' demands was found wanting. Public sentiment increasingly reflected the view that individual workers could not adequately address their differences with organized capital and that the courts and common law unfairly favored employers.[5] Initially, the Supreme Court blocked legislative attempts to use other solutions, enshrining individual bargaining in the Constitution.[6] However, in the face of the economic crisis of the 1930s and executive threats to pack the Court with members who were more sympathetic to the need to try something different, the Court relented and allowed legislative experimentation with other solutions.[7] These solutions included direct regulation of the terms and conditions of employment and the promotion of collective bargaining. Congress enacted the Social Security Act[8] and Fair Labor Standards Act of

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3. LEROY S. MERRIFIELD ET AL., LABOR RELATIONS LAW: CASES AND MATERIALS 6-11 (8th ed. 1989); 1 THE DEVELOPING LABOR LAW 3-12 (Charles J. Morris ed., 1983); Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1358-79 (1983).

4. An example is *Commonwealth v. Pullis* (the Philadelphia Cordwainers case), decided in the Mayor's Court of Philadelphia in 1806. *See* 3 A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 59 (John R. Commons et al. eds., 1910); *see also* People v. Melvin, 2 Wheeler Crim. 262, 268, 282 (N.Y. Gen. Sess. 1810).

5. 1 THE DEVELOPING LABOR LAW, *supra* note 3, at 13.

6. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (striking down the National Industrial Recovery Act as unconstitutional); Adair v. United States, 208 U.S. 161 (1908) (holding prohibition on anti-union discrimination in the Erdman Act unconstitutional), *overruled by* Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941); HENRY PELLING, AMERICAN LABOR 123-24 (1960) (arguing that child labor laws are unconstitutional).

7. Indeed, the historic "switch in time that saved nine" came in the case upholding the constitutionality of the National Labor Relations Act. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). Approval of the Fair Labor Standards Act came in Overnight Motor Transp. Co. v. Missel, 316 U.S. 572 (1942).

8. Social Security Act, Pub. L. No. 271-531, 49 Stat. 620 (1935) (codified at 42 U.S.C. §§ 301-1397 (1988)).

1938[9] to provide certain minimum standards for retirement and employment, and the National Labor Relations Act[10] to actively promote collective bargaining as a method of addressing the needs of workers. With the blessings of the federal government, the states also enacted workers' compensation and unemployment compensation statutes to provide minimal income security for workers who were injured on the job or discharged for lack of work.[11] Congress later retreated from the strong commitment to collective bargaining it expressed in the original National Labor Relations Act by adopting the Taft-Hartley amendments.[12] Similarly, the Supreme Court, through certain interpretations of the Act, limited the reach of its provisions.[13]

Recently, the federal government and the courts have undertaken new efforts to address the needs of wage workers. Since the early 1960s, the federal government has undertaken a fairly ambitious regimen of legislation regulating the employment relationship. This regimen has included enactment of the Civil Rights Act of 1964,[14] the Occupational Safety and Health Act of 1970,[15] the Employee Retirement Income Security Act of 1974,[16] the Worker Adjustment and Retraining Notification Act,[17] and the Family Leave and Medical Act of 1993.[18] Also of late, the courts have addressed the concerns of working people by reevaluating the common-law doctrine of

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9. Fair Labor Standards Act of 1938, ch. 676, § 1, 52 Stat. 1060, 1060 (codified as amended at 29 U.S.C. §§ 201-219 (1988 & Supp. II 1990)).

10. 29 U.S.C. §§ 141-187 (1988).

11. See, for example, California's Unemployment Insurance Code, CAL. UNEMP. INS. CODE §§ 1-16,010 (West 1986) and Massachusetts' Workmen's Compensation Statute, MASS. GEN. L. ch. 152, §§ 1-86 (1989). Actually, workers' compensation statutes enjoyed a fair amount of success before the Great Depression, Arthur Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206, 231-34 (1952), but unemployment compensation statutes were generally enacted in response to the legislative scheme promoting such statutes under the Social Security Act, *see* 42 U.S.C. §§ 501-504 (1988).

12. Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 151-161 (1988)).

13. NLRB v. First Nat'l Maintenance Corp., 452 U.S. 666 (1981) (establishing that decisions to partially close an operation are not subject to bargaining under the National Labor Relations Act (NLRA)); NLRB v. MacKay Radio & Tel. Co., 304 U.S. 333 (1938) (establishing the right of employers under the NLRA to permanently replace striking employees); NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958) (establishing the distinction between mandatory and permissive subjects of bargaining under the NLRA).

14. 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. III 1991).

15. Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. §§ 651-678 (1988).

16. Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461 (1988).

17. 29 U.S.C. §§ 2101-2109 (1988).

18. Family Leave and Medical Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (1993) (to be codified in scattered sections of 2 U.S.C., 5 U.S.C., and 29 U.S.C.).

employment at will.[19] Under this doctrine, an employee for an indefinite term can be discharged by his or her employer for "any reason or no reason" absent express contractual or statutory protection.[20] The courts of many states have provided limited protection to employees from discharge under the most egregious circumstances by extending arguments in tort and contract.[21]

This brief retrospective demonstrates that over the history of our country American society has used at least four means to address the demands of the wage class: individual bargaining, collective bargaining, legislative regulation of the employment relationship, and adaptation of the common law. In this Essay, I will assess the pros and cons of each of these methods of meeting worker demands and examine how those demands and the American work force have changed over time. From this rudimentary comparative institutional analysis,[22] I hope to divine something about how worker demands will be met in the future and the future of labor and employment law.

I. METHODS OF MEETING THE DEMANDS OF WORKERS

A. Individual Bargaining

As previously mentioned, the first method that was used under American law to address worker demands was individual bargaining. Workers were free to negotiate individually with employers over terms of employment and to select among offers made by competing employers.

There are several advantages to resolving worker demands through individual bargaining. Individual bargaining allows the parties to achieve a customized or personalized solution to individual desires or problems.

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19. *See* Arthur S. Leonard, *A New Common Law of Employment Termination*, 66 N.C. L. REV. 631 (1988).

20. Clarke v. Atlantic Stevedoring Co., 163 F. 423 (E.D.N.Y. 1908); Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976).

21. *See, e.g.*, Woolley v. Hoffmann-La Roche, Inc., 499 A.2d 515 (N.J. 1985) (holding that worker cannot be discharged in violation of representations made in employee handbook); Fortune v. National Cash Register Co., 364 N.E.2d 1251 (Cal. Dist. Ct. App. 1977) (holding that worker cannot be discharged to avoid paying commissions already earned); Petermann v. International Brotherhood of Teamsters, Local 396, 344 P.2d 25 (Mass. 1959) (finding a public policy exception that employee at will cannot be discharged for refusing to violate the law).

22. Each of the four methods of addressing workers' demands discussed in this Essay can be viewed as an "institution" for meeting those demands. In assessing the relative costs and benefits of these institutions in meeting workers' demands I undertake what has been described as a "comparative institutional analysis." For a more complete description of comparative institutional analysis, see Neil K. Komesar, *Injuries and Institutions: Tort Reform, Tort Theory, and Beyond*, 65 N.Y.U. L. Rev. 23 (1990).

Workers vary according to their productivity and compensation needs.[23] Ideally, through individual bargaining, each worker will be compensated according to his or her marginal product in a way that meets his or her individual needs.[24] In addition, economic theory suggests that in an idealized competitive economy, individual bargaining will result in the maximization of total wealth.[25] Assuming perfect information, zero transaction costs, and competitive markets, workers and employers will agree to employment contracts that accommodate workers' needs for compensation, safety, and income security to the extent that the benefits from such provisions to the employees exceed their costs to the employers and are warranted by the employees' productivity. As a result, individual bargaining is attractive on normative grounds to those who treat wealth maximization as a normative principle.[26] Individual bargaining is also attractive on normative grounds to those who accept a libertarian perspective because it is the logical result of full freedom of contract, and such bargaining allows each member of society the greatest opportunity to pursue his or her own benefit with minimal interference with other people's desires.[27]

Unfortunately, there are also several practical limitations on individual bargaining as a method of meeting worker demands. Individual workers do not always have the resources, information, or capacity to evaluate adequately all

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23. For example, workers who are young commonly have a great need for current income to raise children, while workers who are old have a relative preference for income that is deferred until after retirement. Similarly, workers who are single generally have less need for insurance than workers who have families.

24. HAL R. VARIAN, INTERMEDIATE MICROECONOMICS 525 (1987).

25. This observation is basically a restatement of the First Theorem of Welfare Economics that competitive equilibria are efficient. *See* HAL R. VARIAN, MICROECONOMIC ANALYSIS 200 (2d ed. 1984).

26. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 10-11 (4th ed. 1992); Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 488-502 (1980). What is commonly omitted in wealth maximization analyses, and what makes the wealth maximization perspective an incomplete normative theory, is that, according to the Second Theorem of Welfare Economics, the efficient solution arrived at by the competitive market depends on the initial distribution of resources and by varying that distribution one can select among alternate efficient solutions. VARIAN, *supra* note 25, at 200-01. Accordingly, one needs a theory of the appropriate distribution of resources in society in order to complete wealth maximization as a determinative normative theory for social policy. Cento G. Veljanovski, *Wealth Maximization, Law & Ethics—On the Limits of Economic Efficiency*, 1 INT'L REV. L. & ECON. 5 (1981).

27. Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984); Epstein, *supra* note 3. Indeed, at least as proffered by Professor Epstein, the libertarian analysis of the employment relationship is very close to the wealth maximization analysis, *id.* at 1380, and suffers from the same deficiency of ignoring distributional questions. *Compare* Charles Fried, *Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and Its Prospects*, 51 U. CHI. L. REV. 1012, 1016-17 (1984) *with* sources cited *supra* note 26.

the risks they encounter in the workplace.[28] This seems particularly true of highly technical or long-term latent risks, such as those that arise from exposure to harmful chemicals, but it may also be true of other risks, such as the risk of personal injury or the risk that the employer will later lay off or discharge the employees. Accordingly, employees undervalue the potential costs from such risks in their negotiations with their employers, and a portion of the actual costs become external to employers' decisions on how to operate.[29] As a result, under individual bargaining employees will not ask for adequate compensation for these risks, and employers will not have adequate incentive to adopt all safeguards against such risks for which the benefits of the safeguards exceed their costs.[30]

Moreover, individual workers do not always have the resources or the incentives to negotiate and enforce efficient contract terms with their employer. Many terms of employment—the air quality in the workplace, the lighting in the workplace, and the speed of the assembly line, for example—are public goods, and improvements cannot be enjoyed by one worker to the exclusion of other workers.[31] As a result, individual workers have incentive to "free ride" on improvements in such goods negotiated by other workers, resulting in an inefficiently low level of such public goods in the workplace.[32] Moreover, it is sometimes efficient for employees to enter into long-term implicit contracts with their employer in which a portion of the employees' income is deferred as an investment in firm-specific training or as a guarantee against slacking.[33] However, such agreements run a substantial risk of breach because employers have incentive to discharge employees before the employees receive the deferred compensation. Because individual

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28. GUIDO CALABRESI, THE COSTS OF ACCIDENTS 91 (1970); Paul J.H. Schoemaker, *The Expected Utility Model: Its Variants, Purposes, Evidence and Limitations*, 20 J. ECON. LIT. 529, 544-52 (1982).

29. Although imperfect information may also lead to overvaluation of the potential risks and their costs, empirical evidence suggests that employees consistently *under*value such risks and their costs. *See* Schoemaker, *supra* note 28, at 544-45. The fact that under the contractual regime of the common law employers rarely insured employees against job hazards also suggests that employees systematically undervalue such risks. This is evident because some of the risks of the time certainly merited insurance, and the employers were probably the most efficient insurer relative to the employee since they were less risk averse and had more knowledge and control of work risks.

30. VARIAN, *supra* note 24, at 548-52.

31. RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 8 (1984).

32. *Id.*

33. Michael L. Wachter & George M. Cohen, *The Law and Economics of Collective Bargaining: An Introduction and Application to the Problems of Subcontracting, Partial Closure, and Relocation*, 136 U. PA. L. REV. 1349, 1359-60 (1988). Such long-term contracts remain implicit due to negotiation and enforcement costs. Nevertheless, these contracts are efficient because they allow employees to invest in firm-specific training and give employees incentive not to slack. If employees are caught slacking, they will be discharged and lose the deferred income.

employees cannot effectively enforce such long-term implicit contracts, they do not negotiate them, with the result being that employees undertake too little firm-specific training and employers undertake other, less efficient efforts in monitoring employee effort.[34]

Finally, individual employees do not have enough bargaining power to share fully in potential proceeds of the firm or to prevent possible exploitation by their employer. Markets are not always competitive. Employers may enjoy market power rents in the product market or, perhaps, even monopsony power rents in the labor market.[35] Individually, employees cannot gain a share of employer product market rents or prevent exploitation by an employer monopsony in the labor market.[36] Even in a competitive market, widespread distaste for associating with people of a certain race or gender and widespread belief in stereotypes concerning the relative skills of people of different races or gender can leave members of the disfavored class with limited opportunities that do not fully utilize or compensate them for their productive capacity.[37] Under individual bargaining, employees will receive only their opportunity wage,[38] which employer monopsony power or discrimination can keep artificially low.

Given the decentralized nature of individual bargaining and its rough association with wealth maximization, it is not surprising that individual bargaining was the dominant means of accommodating inconsistent needs at common law and was the first means used to address the demands of workers in the United States. Although individual bargaining remains the dominant method of addressing worker demands in the United States, given its limitations, it was inevitable that the country would eventually try other means. It would also seem inevitable that these other solutions would be undertaken primarily in subject areas and using means that would address the failures of individual bargaining to provide adequate bargaining power, to

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34. *Id.* It is argued that the reputational effect of an employer violating such implicit contracts is not an adequate check on employer strategic behavior due to imperfect information on the facts concerning employment and discharge.

35. Traditionally, labor economists have thought that monopsony power in the labor market is rare in the United States. However, even if one accepts this position, it may be that employer monopsony power was historically important and one of the reasons for the passage of the National Labor Relations Act. Richard A. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988, 991-92 (1984).

36. Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 MICH. L. REV. 419, 455-56 (1992).

37. GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION (2d ed. 1971). Sometimes, however, the phenomenon of employment discrimination is perhaps best modeled as a taste for association with certain individuals rather than as a distaste. *See* Matthew S. Goldberg, *Discrimination, Nepotism, and Long-Run Wage Differentials*, 97 Q.J. ECON. 307 (1982).

38. A worker's "opportunity wage" is the wage that the worker would receive in his or her next best employment opportunity.

allow the negotiation of efficient contract terms with respect to public goods, to secure deferred income such as pensions, and to promote adequate safeguards with respect to workplace risks.

B. Collective Bargaining

As an alternative to individual bargaining, workers might band together in a union to negotiate their interests with their employer. As previously discussed, at one time in our history it was even federal policy to encourage collective bargaining as a means of addressing labor's problems.[39]

Collective bargaining provides a fairly decentralized solution to many of the problems of individual bargaining. Although it can by no means address individual needs to the same extent as individual bargaining, collective bargaining still allows solutions specifically tailored to a firm or industry and its employees. The workers and the employer who will have to live with the bargain themselves determine what the most important problems are and what their solutions will be.

Moreover, collectively employees can better address many of the problems they might encounter in the workplace. Unions can hire professionals to evaluate workplace risks such as long-term hazards from toxic chemicals. Collectively, workers can more accurately express their preferences for public goods, such as clean air in the workplace, because individual workers no longer have incentives to hold back their demands.[40] By giving workers a collective voice to address workplace problems, unions can lower worker turnover and thus reduce search and retraining costs.[41] Unions can prevent employer strategic behavior with respect to deferred compensation by negotiating and enforcing seniority and just-cause discharge provisions and by jointly administering pensions. Finally, collectively workers have the bargaining power to gain a share of firm product market rents or to prevent exploitation by an employer monopsony in the labor market. When confronted with an effective union, an employer who enjoys rents from product or labor market power must share those rents in order to continue the operation of his or her firm.[42]

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39. *See supra* text accompanying note 10.

40. FREEMAN & MEDOFF, *supra* note 31, at 8-9.

41. *Id.* at 7-8.

42. Where an employer with a monopsony in the labor market confronts an effective union, if the parties bargain so as to maximize the rent they divide, one can show that the parties will agree to employment of the same amount of labor as would have been employed in a competitive market at the same wage as would have prevailed in a competitive market. DAVEY ET AL., *supra* note 1, at 307-09. Thus, a union can effectively prevent a monopsony employer from exploiting workers. The bargaining problem between an employer who enjoys product market rents and an effective union is indeterminate.

However, collective bargaining also has its limitations. In the course of correcting problems with individual bargaining, unions can put their employers at a competitive disadvantage or give employers incentive to undertake inefficient acts, such as firing productive pro-union employees, locking out employees, or moving the firm to a jurisdiction that is more hostile to employee organization. By correcting problems of imperfect information and inability to assess risk, for example, with respect to hazardous chemicals, unions force employers to take account of and internalize costs that would otherwise be absorbed by workers. Unorganized employers, or employers who can break their employees' union, are free of these costs and are therefore at a competitive advantage.[43] Similarly, if a union is successful in gaining a share of firm product market rents, it gives the employer incentive to relocate or to bust the union, even when there is no efficiency reason for such action. If an employer can successfully free himself or herself of a union, the employer can regain the share of rents that was captured by the employees.

Moreover, unions can sometimes cause inefficiencies in production and consumption. Some unions may choose to gain higher wages at the expense of jobs, bargaining with their employer to sacrifice the positions of future or less senior employees for the benefit of current senior employees.[44] Unions may also sometimes be successful in establishing a labor cartel so that they can directly constrain the supply of labor to drive up wages.[45] Where unions restrict labor supply to a firm or a market, they dislocate workers to other employers or markets and increase the price of the good to consumers. The inefficiencies caused by such constraints on labor supply also give the employer incentive to undertake potentially costly efforts to escape the

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43. For example, if American workers organize and become cognizant of the risks posed by certain dangerous chemicals, they will want to be compensated for that risk, thereby giving their employer incentive to reduce the risk to the efficient level. However, if the employer can move the plant to Mexico, where there is no effective worker organization or cognizance of the hazards involved, the employer can continue production without compensating workers for their risk or taking efficient precautions. Under such circumstances, producers in Mexico will be at a competitive advantage and will be able to produce the product at a lower price, even if American and Mexican wages are otherwise equalized after accounting for differences in productivity.

44. Unions may do this either by bargaining over employer product rents or by forcing the employer to pay union wage increases out of quasi-rents on machinery, thereby discouraging future employer investment in the firm. Dau-Schmidt, *supra* note 36, at 430-31, 439 n.65.

45. It has been argued that the actual cartelization of labor markets by labor unions is rarer than is commonly supposed under the traditional economic analysis of labor unions. *Id.* at 423, 468-73; Daniel R. Fischel, *Labor Markets and Labor Law Compared with Capital Markets and Corporate Law*, 51 U. CHI. L. REV. 1061, 1072-73 (1984).

union.[46] Although empirical studies suggest that unions cause only small inefficiencies over the economy as a whole,[47] these inefficiencies may be significant in particular occupations or industries.

Finally, due to the costs of collective bargaining and the democratic nature of unions, collective bargaining will never be an effective means of addressing the needs of all workers. Organizing a union is costly for employees in terms of time, membership dues, and the willingness to suffer possible strategic behavior by the employer, such as discriminatory discharges or lockouts. Employees in industries where job tenure is transient, or employees who are particularly susceptible to employer strategic behavior because they are easily replaced or have few resources, will not undertake the costs of forming a union, even though workers in the industry as a whole could benefit greatly from such organization. In addition, because they are democratic organizations, unions respond to the will of the majority of their members. As a result, unions are not a promising means for responding to the unique demands of an insular minority. For example, although there have been exceptions,[48] historically unions have not been in the vanguard of those seeking to address the problems of race and sex discrimination.[49]

Due to its decentralized nature and its potential to address a broad range of problems, it is not surprising that collective bargaining was among the first of the alternate means of meeting workers' needs used in response to the failures of individual bargaining. Although collective bargaining is still an important means of addressing the needs of workers in the United States, the fortunes of organized labor in America have recently suffered a precipitous decline.[50]

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46. Unlike where the employer acts to avoid unionization in order to continue to externalize costs or to recapture product market rents, where the employer acts to avoid unionization due to constraints on labor supply, such acts and their costs can be efficient because the employer is helping to undermine a labor cartel and improve efficiency.

47. ALBERT REES, THE ECONOMICS OF TRADE UNIONS 94-95 (3d ed. 1989); Robert H. DeFina, *Unions, Relative Wages, and Economic Efficiency* 1 J. LAB. ECON. 408, 428 (1983) (estimating that even under the monopoly model of unions the total production and consumption efficiency loss for the economy as a whole is approximately 0.2%); Albert Rees, *The Effects of Unions on Resource Allocation*, 6 J.L. & ECON. 69 (1963).

48. For example, the United Auto Workers was one of the groups that organized the civil rights march on Washington in 1963 at which Dr. Martin Luther King gave his much celebrated "I Have a Dream" speech. A variety of labor organizations supported the passage of the 1964 Civil Rights Act. FREEMAN & MEDOFF, *supra* note 31, at 192.

49. Steele v. Louisville & N. R.R., 323 U.S. 192 (1944) (enforcing labor organization's duty to represent African-American members' claims).

50. In the 1950s, the percentage of private sector non-agricultural workers who were organized approached 40% and as late as 1970 it was around 30%. FREEMAN & MEDOFF, *supra* note 31, at 222. The figure is currently under 15%. PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 105 (1990).

There are several reasons for this decline. First, the demographics of the American work force have changed so that there are now proportionately more young workers, women workers, and white-collar workers in the paid labor force.[51] Women and the young tend to be more transient workers, and therefore harder to organize, while white-collar workers have traditionally disdained organization. Second, increases in the level of international competition in many manufacturing industries have decreased employer product market rents and thus lessened the benefits to be gained through organization in those industries.[52] With declines in the rents employees can obtain through organization, unions in these industries have had to make wage concessions and have had less luck in organizing.[53] Finally, as currently formulated and interpreted, the National Labor Relations Act does not adequately protect employees from employer strategic behavior or adequately encourage employers to negotiate collective agreements with their employees once the employees have decided to organize. Penalties under the Act are too small to act as an adequate deterrent and there are just too many opportunities under the Act for employers to delay or avoid bargaining responsibilities.[54] These deficiencies in the law, combined with recent increases in employers' efforts to resist unions, have substantially contributed to the decline of unions in the United States.[55]

With the decline of collective bargaining and the growing realization that this means of addressing workers' needs will never adequately meet the needs of some workers, namely transient, low-skill workers and minority workers, American workers have sought other means through which their demands might be met.

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51. FREEMAN & MEDOFF, *supra* note 31, at 224-26.

52. *See, e.g.*, William B. Gould IV, *Reflections on Workers' Participation, Influence and Powersharing: The Future of Industrial Relations*, 58 U. CIN. L. REV. 381, 382 (1989); James V. Higgins, *Unionized Auto Plants Losing Ground*, DETROIT NEWS, Sept. 27, 1991, at E1; John Holusha, *Unions Are Expanding Their Role to Survive in the 90's*, N.Y. TIMES, Aug. 19, 1990, at F12.

53. Holusha, *supra* note 52, at F12.

54. FREEMAN & MEDOFF, *supra* note 31, at 233-43; Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983) [hereinafter *Promises to Keep*]; Paul C. Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351 (1984).

55. FREEMAN & MEDOFF, *supra* note 31, at 233-43. Also, see generally Joel Rogers, *Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Laws,"* 1990 WIS. L. REV. 1, on the post-war decline of organized labor under American labor law.

C. Legislative Regulation of the Employment Relationship

Yet another possible means of addressing employee demands is the adoption of state or federal legislation governing aspects of the employment relationship. Worker interests that are not addressed through individual or collective bargaining may find expression in the ballot box.

Addressing worker demands through legislation has several advantages. Like collective bargaining, legislation can solve many of the problems of individual bargaining. The government can enact laws holding employers strictly liable for workplace injuries or health hazards, thus giving employers incentive to take efficient precautions.[56] In addition, the government can employ experts to evaluate workplace risks and use these evaluations as the basis for statutes or regulations which define the precautions employers must undertake to lessen those risks. The government can also provide solutions to the public good problem by acting as the workers' collective voice in specifying the levels that should prevail in the workplace for public goods such as safety and cleanliness. Furthermore, the government can discourage the worst forms of employer strategic behavior under implicit contracts, for example, by prohibiting employers from discharging long-term employees just before retirement to prevent the employees from obtaining a pension.[57]

Legislation addressing worker demands can also solve some of the problems associated with collective bargaining. Although employees are fired for union activity with disturbing regularity,[58] the secrecy of the voting booth prevents employers from firing workers based on the votes they cast for elected

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56. The government would have to prohibit employees from waiving such employer liability. Otherwise, the employees would simply bargain away their rights based on their inadequate appraisals of workplace risks.

57. *See* ERISA § 510, 29 U.S.C. § 1140 (1988). The periodic vesting of pensions under ERISA also discourages employer opportunistic behavior by lessening the incentive to discharge employees at any given time to prevent them from getting a pension.

The government can also address the problem of redistributing employer product market rents through taxes, antitrust policy, or the promotion of collective bargaining. In addition, to the extent the government corrects inefficiencies that arise due to imperfect information or inability to assess risk, the government will redistribute wealth since costs that were previously borne by the workers will now be borne by the employer. However, in general the government cannot affect the distribution of wealth between the two parties by creating entitlements with respect to the employment relationship, save to the extent such entitlements change the relative bargaining power of unions and employers, because the parties here already have a contractual relationship. Stewart J. Schwab, *Collective Bargaining and the Coase Theorem*, 72 CORNELL L. REV. 245, 262-63 (1987). For example, if the law requires employers to bear a risk that the employees previously knowingly bore and for which the employees received a compensating wage, after the enactment of the law the employees will not bear the risk, but they will also no longer receive the compensating wage, leaving the relative position of the parties with respect to wealth unchanged.

58. FREEMAN & MEDOFF, *supra* note 31, at 232-33; *Promises to Keep*, *supra* note 54, at 1779-81.

offices. In addition, although collective bargaining will never be a realistic remedy for workers in some industries, legislation can reach as many workers as is allowed by the resources the legislature and executive commit to the problem.

As with the other solutions, government regulation of the employment relationship has its limitations. Although solutions on an industry-wide basis are still possible, legislation cannot offer solutions as particularized as those provided by the more decentralized methods of individual and collective bargaining. Moreover, to the extent that legislators or administrators are mistaken about the need to correct a problem, government regulation can introduce inefficiency into the production process. For example, if the government were to specify that industry should reduce worker exposure to "the extent technically feasible,"[59] rather than to the level where the costs of additional precautions outweigh their benefits,[60] then firms may be forced to undertake precautions for which the benefits do not exceed the costs.[61] Finally, even if the legislation does correct an inefficiency caused by individual bargaining, regulation can still give employers incentive to move to a jurisdiction that does not make this correction, or it can place regulated employers at a competitive disadvantage relative to firms that are already located in less progressive jurisdictions. For example, if neither American nor Mexican employees fully realize the dangers of exposure to a certain chemical, and the U.S. government imposes an obligation on its employers to take efficient precautions while the Mexican government does not, then such regulation will impose a cost on American producers that is not borne by firms in Mexico, thereby putting firms located in the United States at a competitive disadvantage, even though the regulation merely requires efficient precautions.

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59. This standard is similar but not identical to the actual current standard for rules promulgated on the exposure of workers to toxic chemicals under the Occupational Safety and Health Act (OSHA). *See* American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490 (1981) (interpreting OSHA § 6(b)(5)). The actual current standard also considers the effect of the rule on the economic viability of affected industries. *Id.*

60. Of course, estimating the benefits of a safety or health precaution involves the empirically and philosophically challenging task of placing a dollar value on human life. *See* Steven E. Rhoads, *How Much Should We Spend to Save a Life?*, 51 PUB. INTEREST 74 (1978); Richard Zeckhauser, *Procedures for Valuing Lives*, 23 PUB. POL'Y 419 (1975).

61. Of course, there may be normative reasons why society would want firms to undertake even inefficient precautions. Efficiency is just one of several values human beings hold dear in their normative judgments. When I point out that certain practices are inefficient, I am merely making a positive observation that inefficiency occurs rather than a normative judgment that this consideration should outweigh all others.

Government regulation is currently the preferred alternative to individual bargaining as a means of addressing worker concerns. The current regime of legislative regulation of the workplace began with workers' compensation statutes that sought to ensure that employers compensated workers for, and took account of, the costs of safety and health risks in the workplace. The popularity of such regulation grew at the beginning of this century when the nature of workplace risks became significantly more complex with the advent of modern manufacturing methods.[62] Later, as it became apparent that collective bargaining would not address all the problems of workers, the legislative agenda was expanded to include problems such as discrimination,[63] pension security,[64] and plant-closing notification,[65] and further legislation with respect to health and safety.[66] The pursuit of legislation to address these problems enjoys a benefit relative to collective bargaining in that workers who support such legislation are not subject to discharge for that support. With the increased participation of women in the paid work force, the legislative agenda has taken a turn towards problems that concern women and two-earner households, namely comparable worth,[67] sexual harassment,[68] and parental leave.[69] One potential limit on the use of legislation that looms ominously on the horizon is the recent increase in international trade. As previously discussed, even when legislation successfully addresses failures of individual bargaining and promotes efficiency, such legislation can put American firms at a competitive disadvantage relative to firms in other countries that do not address these failures.[70]

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62. POSNER, *supra* note 26, at 334-35.

63. 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. III 1991).

64. ERISA, 29 U.S.C. §§ 1001-1461 (1988).

65. 29 U.S.C. §§ 2101-2109 (1988).

66. OSHA, 29 U.S.C. §§ 651-678 (1988). Note that the regulatory efforts in the OSHA are not entirely duplicative of workers' compensation in terms of giving adequate incentives to reduce industrial accidents and illnesses. Because current workers' compensation laws do not require employers to pay the employees' full wage loss from accidents or to compensate employees for industrial illnesses that are hard to prove are job related, they do not prompt employers to take adequate precautions with respect to health risks that employees cannot properly evaluate but that might be efficiently regulated through an OSHA standard.

67. MINN. STAT. ANN. §§ 471.991-.999 (West 1992).

68. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of U.S.C.) (making it clear that the Equal Employment Opportunity Act of 1972 allows damages for sexual harassment); Stuart H. Bompey & John D. Giansello, *The Civil Rights Act of 1991: An Analysis*, *in* THE CIVIL RIGHTS ACT OF 1991: ITS IMPACT ON EMPLOYMENT DISCRIMINATION LITIGATION 87, 97 (1992).

69. Family Leave and Medical Act of 1993, Pub. L. No. 103-3, 107 Stat 6 (to be codified in scattered sections of 2 U.S.C., 5 U.S.C., and 29 U.S.C.).

70. *See supra* text accompanying note 62.

D. Development of the Common Law

A final means of addressing the needs of workers is for the courts to amend the common law to meet those needs more fully. For example, rather than having the legislature pass a law, the courts might adopt a doctrine that holds employers strictly liable for all accidents or illnesses in the workplace.[71]

Adaptation of the common law can solve some of the problems of individual bargaining. Holding employers strictly liable for the health hazards of the workplace would compensate employees and give employers incentive to reduce those hazards, at least for those harms that could later be sufficiently traced back to the workplace.[72] Such strict liability would also encourage employers to identify and minimize workplace hazards even before those hazards result in deaths or injuries. Similarly, the courts could prohibit the most extreme cases of employer strategic behavior that violates implicit contracts. For example, the courts could prohibit employers from discharging employees where the motive for the discharge is to avoid paying a commission or pension already earned.[73]

There are of course disadvantages to this approach. Litigation is very costly. Along with time and lawyers' fees, employees rarely have a bright future with an employer they take to court. Because court solutions come after the fact and defendants can be judgment-proof, amendment of the common law does not work well with new risks of substantial size since the employer may be bankrupt by the time the harms caused by the conditions of employment become apparent. The recent bankruptcy filings of asbestos processing firms in the face of employee and consumer lawsuits amply demonstrate this shortcoming.[74] Moreover, repeat players in litigation, such as employers who

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71. The courts, of course, cannot allow workers to waive such liability on the part of the employer since employers will merely have employees sign blanket waivers before they begin work, which the employees will gladly do at minimal or no cost because they do not adequately understand the health risks of the workplace.

72. Some manifestations of industrial risks, for example, cancer and heart attacks, are sufficiently ambiguous in origin that ex post determinations of liability probably cannot provide adequate compensation to employees or incentive to employers to take care. Was the onset of the employee's cancer caused by chemicals the employee was exposed to on the job, a genetic predisposition, or cigarette smoking?

73. Fortune v. National Cash Register Co., 364 N.E.2d 1251 (Mass. 1977). There are limits to this remedy, however, because it is difficult to prove breaches of these agreements in court, which is also one reason they stay implicit. *See supra* note 34.

74. *See, e.g.*, Kane v. Johns-Manville Corp., 843 F.2d 636 (2d Cir. 1988). Johns-Manville, once the world's largest miner of asbestos and manufacturer of insulation materials, filed for bankruptcy under the weight of over 12,500 actual suits and 100,000 potential suits from persons already exposed to asbestos. *Id.* at 639. For a discussion of the Johns-Manville cases, see Stacy L. Rahl, Note, *Modification of a Chapter 11 Plan in the Mass Tort Context*, 92 COLUM. L. REV. 192 (1992).

are sued by many employees, tend to have an advantage over nonrepeat players, such as individual employees who sue their employer only once. The precedential value of the case gives the repeat player more incentive to litigate and appeal than the nonrepeat player.[75] Finally, as with collective bargaining and legislation, common-law doctrines favorable to workers in one jurisdiction can put employers in that jurisdiction at a competitive disadvantage relative to employers in other jurisdictions. For example, if courts in Indiana hold employers strictly liable for workplace hazards, while courts in Kentucky do not, employers in Indiana will bear the costs of hazards that were undervalued by employees, while employers in Kentucky will not. Once again, this result occurs despite the fact that it may be efficient to hold employers strictly liable the costs of workplace injuries.

The state of the common law with respect to employer and employee relations remained inert in this country for many decades. Indeed, it was the failure of the courts to adapt the common law to changed industrial conditions that gave much of the impetus to early legislative initiatives in employment relations. When combined with the exigent circumstances of the Great Depression, the courts' failure finally led to the New Deal legislation that sought to encourage collective bargaining and to regulate various aspects of the employment relationship.[76] However, adaptation of the common law to the needs of workers has enjoyed a modest rebirth of late, at least on the subject of employee discharges and the employment-at-will doctrine.[77] This rebirth is perhaps attributable to the fact that the courts have become more accustomed to the idea of new rights and relationships in industrial relations under the new legislative regime,[78] and to the fact that it has now become clear that, at least in the short run, collective bargaining will serve as a means of addressing employee demands for only a very limited number of employees.[79] Given its limitations, however, it seems unlikely that adaptation of the common law will ever become the primary means of addressing employee demands in this country.

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75. Paul H. Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 51, 55-56 (1977). Employers also generally have more resources than employees, which, given imperfections in the capital market, give them an advantage in costly litigation.

76. COX ET AL., *supra* note 1, at 84-87.

77. *See supra* text accompanying note 19.

78. HENRY H. PERRITT, JR., EMPLOYEE DISMISSAL: LAW AND PRACTICE § 1.10 (2d ed. 1987). For example, judges accustomed to giving employees remedies for employment discrimination find it incongruous that they would not be able to compensate or reinstate employees who were fired for refusing to break the law or that the employer can avoid paying employees a commission that was already earned.

79. *See supra* notes 50-55 and accompanying text.

II. IMPLICATIONS FOR THE FUTURE OF LABOR AND EMPLOYMENT LAW

What are the implications of this analysis for the future of labor and employment law? While the short-term implications are not very startling, for the long term my analysis portends a great challenge and a need for change.

In the short term, I would expect all current trends to continue. Individual bargaining will remain the dominant means of addressing worker demands in the United States. The slow strangulation of unions in the private sector will continue, although this trend may be somewhat abated as unions develop strategies for organizing and meeting the needs of white-collar workers. A comprehensive package of labor-law reforms, including substantially increased penalties for violations of the National Labor Relations Act,[80] abbreviated proceedings for determining union representation in order to preclude employer interference,[81] expansion of the mandatory subjects of bargaining,[82] and a prohibition on the permanent replacement of striking employees,[83] could help reverse this decline, but the chance of such legislation in the short run seems remote given the ability of even a small number of senators to block the passage of such reform.[84] However, because its benefits are more broadly enjoyed and because employees who support progressive legislation are not subject to employer strategic behavior, the pace of uniform regulation governing the employment relationship will remain unimpeded, and may even quicken with the recent election of President Clinton. Responding to changes in the demographics of the paid work force, these legislative efforts will be aimed at the problems of women and two-earner families in the workplace. These are likely to include enactment of federal legislation on child care, proportional benefits for part-time employees, and health insurance, as well as the recent enactment of the family leave bill.[85] The current review of the employment-at-will doctrine by the courts will continue, but given the costs of litigation and the limited possibilities for addressing

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80. Dau-Schmidt, *supra* note 36.

81. *Promises to Keep*, *supra* note 54, at 1811-16.

82. *See* Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 307-09 (1978).

83. *See, e.g.*, H.R. 5, 102d Cong., 1st Sess. (1991).

84. This power was amply demonstrated in the fight over fairly modest labor law reform in 1978 when a majority in both houses of Congress and the President favored labor law reform but were thwarted by a determined minority in the Senate. BARBARA TOWNLEY, LABOR LAW REFORM IN US INDUSTRIAL RELATIONS (1986); Gerald E. Rosen, *Labor Law Reform: Dead or Alive?*, 57 U. DET. J. URB. L. 1 (1979).

85. Family Leave and Medical Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (to be codified in scattered sections of 2 U.S.C., 5 U.S.C. and 29 U.S.C.).

worker demands through the evolution of the common law, I do not see the courts developing into the leading forum for addressing workers' needs.

However, in the long term, the United States will have to come to terms with the fact that it now operates in a global economy. As discussed above, the use of collective bargaining, regulation of the employment relationship, or adaptation of the common law to address the needs of workers can give employers incentive to relocate to foreign countries that do not address these problems. Even if American employers do not send their capital overseas, the fact that the United States might try to address some of the shortcomings of individual bargaining through these alternative methods of addressing worker demands means that U.S. firms will be placed at a competitive disadvantage relative to firms in countries that do not try to address these shortcomings. If the United States is to continue to meet the demands of workers, it will have to encourage other countries to do the same thing—either through international treaties or by placing tariffs on goods from countries that engage in "unfair methods of competition," such as exposing their workers to unsafe levels of hazardous chemicals or allowing the exploitation of their workers by labor monopsonies.[86] The alternatives are merely to be content to lose the jobs in industries where failure to address the problems of individual bargaining yields substantial competitive advantages or to hope that workers in countries less fortunate and less democratic than our own will be able to compel their employers and their governments to adequately address these problems.

On the positive side for unions, I imagine that in the long term producers in various international markets will organize in oligopolies or cartels that will yield employer product market rents.[87] These rents could serve as a source of union wage and benefit increases that could fuel an international movement to organize labor. American history shows that as employers organized on first a regional and then a national basis, workers, of necessity, also organized on a regional and national basis.[88] Assuming that unions can form the associations that will be necessary to organize internationally, and that sufficient numbers of countries retain or enact legislation that allows

86. Then-Governor Clinton recognized the need for such efforts in response to questions on the North American Free Trade Agreement during the third presidential debate of 1992. *The 92 Vote: The Third Presidential Debate* (ABC television broadcast, Oct. 19, 1992), transcript *available in* LEXIS, Nexis Library, Trancript File. Such treaties or tariffs will also probably be necessary to take care of other externalities on an international basis, such as ocean dumping, air pollution, and the exploitation of exhaustible resources over which no country exercises exclusive control.

87. There are already several international cartels organized by, or with the blessings of, various governments, for example, in oil and diamonds. There are also signs of increased cooperation among firms in various international markets that may be the prelude to collusion. *See* Stanley J. Modic, *Strategic Alliances*, INDUSTRY WK., Oct. 3, 1988, at 46.

88. COX ET AL., *supra* note 1, at 12-17; DAVEY ET AL., *supra* note 1, at 18-22.

collective bargaining, the product market rents earned by international cartels will provide an incentive and reward for labor organizing on an international basis.

In the end, of course, the extent to which American labor and employment law will meet the demands of workers in the twenty-first century will depend on the efforts of those workers to pursue their interests in the available legal forums. It is only through the imagination and hard work of these people in organizing, lobbying for legislative change, and pursuing their claims in court that the unique interests of the wage class have found expression in the American social and political agendas. As long as this class of wage workers with its distinct interests exists, there will also exist the need to give expression to those interests through bargaining, political action, and litigation.